

DRAFT
CONFIDENTIAL SETTLEMENT COMMUNICATION
SUBMITTED UNDER FRE 408 AND ANY STATE LAW EQUIVALENT
RESIDENTIAL USE AREA WORK AND COST AGREEMENT

This Agreement is made and entered into among Union Pacific Railroad Company, a Delaware corporation (“UPRR”), BNSF Railway Company, a Delaware corporation (“BNSF”), and the Idaho Department of Environmental Quality (the “IDEQ”), an agency of the State of Idaho. UPRR, BNSF and the IDEQ are referred to collectively herein as the “Parties” and may be individually referred to herein as “Party.”

RECITALS

A. UPRR, BNSF and the State of Idaho are parties to a Consent Decree in *United States of America and State of Idaho. v. Union Pacific Railroad Company and BNSF Railway Company*, Civil Action No. _____, United States District Court, District of Idaho, entered on **[insert month day]**, 2009 (the “Consent Decree”). The Consent Decree provides, *inter alia*, for the performance or funding of response work by UPRR and BNSF at the Wallace Yard and Spur Lines Site generally located in and near Wallace, Idaho, and in nearby canyons known as Ninemile Creek and Canyon Creek (the “Site”).

B. The IDEQ has an ongoing Residential Use Area (“RUA”) program under which it tests residential properties in the Coeur d’Alene Basin for lead and arsenic, and, depending upon the test results, conducts a yard cleanup. Under paragraph 11 of the Consent Decree, UPRR and BNSF agree to fund IDEQ implementation of the RUA program for certain residential properties that are within the boundaries of the former rights-of-way of the Washington & Idaho Railroad Company (“WIRR”) and Northern Pacific Railway (“NP”) along Canyon Creek and the former NP right-of-way along Nine Mile Creek. **[Insert reference to documentation of agreement between IDEQ and EPA with respect to RUA program, if any]**

C. UPRR, BNSF and the IDEQ enter into this Agreement in order to fund IDEQ’s implementation of the response actions recommended by the October 2007 Engineering Evaluation/Cost Analysis (“EE/CA”) and selected by EPA’s March 6, 2008 Action Memo for RUAs within the boundaries of the former WIRR and NP rights-of-way along Canyon Creek and the former NP right-of-way along Nine Mile Creek.

AGREEMENT

In consideration of the foregoing and the mutual promises and covenants contained herein, the Parties agree as follows:

1. **Definition of the Former WIRR and NP Rights-of-Way.** A series of figures attached hereto as Exhibit 1 depict the location and full lateral extent of the former WIRR and NP rights-of-way. These figures illustrate the Parties’ agreement as to the boundaries of the former WIRR and NP rights-of-way based on recent site visits and show those boundaries in the context of current topography and property parcel lines. However, the extent of the former WIRR and NP rights-of-way that is potentially subject to response actions is limited to the “Functional Right-of-Way Width.” The Functional Right-of-Way Width or FROWW is defined in the Consent Decree and that definition is incorporated herein by reference.

DRAFT

CONFIDENTIAL SETTLEMENT COMMUNICATION

SUBMITTED UNDER FRE 408 AND ANY STATE LAW EQUIVALENT

2. **Scope of Work.** The work to be performed by the IDEQ under this Agreement is as follows:

(a) **Residential Use Area Response Actions.** For purposes of this Agreement, residential use areas are defined as those portions of privately owned residential property that are within the Functional Right-of-Way Width (hereafter “ROW Residential Use Areas”). ROW Residential Use Areas may include portions of gardens or yards. For work in the ROW Residential Use Areas, the IDEQ will use the same remediation criteria that it uses for its RUA program in other areas of the Coeur d’Alene Basin.

(i) *Sampling.* All sampling required under this Agreement shall be conducted in accordance with the sampling protocol attached hereto and incorporated herein as Exhibit 2.

(ii) *Yards in ROW Residential Use Areas.* If surface soils within a ROW Residential Use Area contain less than 700 mg/kg lead or less than 100 mg/kg arsenic, then the IDEQ will work with the property owner to ensure that landscaping features and gardens in the yard will be undisturbed. If the soils within a ROW Residential Use Area contain more than 700 mg/kg lead or more than 100 mg/kg arsenic, then the IDEQ will excavate the soil to a depth of one (1) foot and remove it. If soil deeper than one (1) foot has lead levels in excess of 700 mg/kg or arsenic levels in excess of 100 mg/kg, then the IDEQ will place a visual marker fabric at the bottom of the one-foot excavation and place clean soil over the visual marker. The IDEQ will replace the contaminated soil it removes with clean soil and replace the surface material with the same material, i.e., grass seed or sod will replace grass and gravel will replace gravel.

(iii) *Gardens in ROW Residential Use Areas.* If, based on the sampling protocol in Exhibit 2, the soils in garden areas located within a Residential Use Area contain more than 700 mg/kg lead or more than 100 mg/kg arsenic, then the IDEQ will excavate the soil to a depth of two (2) feet (if the soil has lead levels in excess of 700 mg/kg or arsenic levels in excess of 100 mg/kg to that depth) and remove it. If soil deeper than two (2) feet has lead levels in excess of 700 mg/kg or arsenic levels in excess of 100 mg/kg, then the IDEQ will place a visual marker fabric at the bottom of the two-foot excavation and place clean soil over the visual marker. The IDEQ will replace the contaminated soil it removes with clean soil and replace the surface material with the same material, i.e., grass seed or sod will replace grass and gravel will replace gravel.

(iv) *Drainage.* In performing the response actions in ROW Residential Use Areas, the IDEQ will take reasonable measures to correct drainage where necessary to protect the response actions from damage and to prevent recontamination of remediated areas. These reasonable measures are defined as minor grading or other actions not requiring ongoing operation and maintenance.

(v) *Areas Excluded from ROW Residential Use Areas.* For purposes of this Agreement, ROW Residential Use Areas do not include the areas described below and further identified on Exhibit 1:

- Segments of the former WIRR right-of-way where the Silver Valley Natural Resource Trustees removed the rail bed embankment, including

DRAFT

CONFIDENTIAL SETTLEMENT COMMUNICATION

SUBMITTED UNDER FRE 408 AND ANY STATE LAW EQUIVALENT

the segments from Mile Marker (“MM”) 0.85 to MM 3.25 and MM 3.65 to MM 4.13;

- The former WIRR right-of-way segment from MM 3.57 to MM 3.65 where rock cover material covers the former WIRR right-of-way; and
- Paved public roads and shoulder areas along those roads where the paved road coincides with the former WIRR right-of-way and the former rail bed embankment is no longer visible. In these areas, the asphalt pavement section, together with any gravel road base placed during road construction, serve as an adequate barrier encompassing the entire Functional Right-Of-Way. These paved public road areas include the following segments:
 - MM 4.13 to MM 4.95;
 - MM 5.06 to MM 5.70; and
 - MM 6.32 to MM 6.90.
- The segment from MM 4.4 to MM 4.9 of the former NP Canyon Creek right-of-way where the rail bed is no longer visible;
- The former Hecla Mill area segment from MM 6.3 to the end of the former NP Canyon Creek right-of-way;
- The segment from MM 2.25 to MM 2.6 of the former NP Ninemile right-of-way where the rail bed is heavily vegetated; and
- The segment from MM 3.8 to the end of the former NP Ninemile right-of-way where the rail bed is not accessible.

[Other areas, if any, to be identified during technical discussions]

In addition, the areas identified in Sections 2(c) and 2(d), below, shall not be considered “ROW Residential Use Areas.”

(vi) *Limitations on and Exclusions from Response Actions.* The scope of work under this Agreement for ROW Residential Use Areas specifically excludes removal of any abandoned vehicles or equipment, junk, trash, garbage or other debris that may be found on ROW Residential Use Areas. If the IDEQ determines that such debris should be removed before it performs a response action, then it will look to the current owner of the property for removal.

(vii) *Portions of Residential Use Areas Outside of the Functional Right-Of-Way.* In connection with the work under this Agreement, the IDEQ may perform response actions on portions of residential use areas outside of the Functional Right-of-Way Width.

DRAFT

CONFIDENTIAL SETTLEMENT COMMUNICATION

SUBMITTED UNDER FRE 408 AND ANY STATE LAW EQUIVALENT

However, the IDEQ shall not seek any reimbursement from UPRR and BNSF for response actions on portions of residential use areas outside of the Functional Right-of-Way Width.

(viii) *Disposal*. The IDEQ shall dispose of soil and other materials removed as part of the ROW Residential Use Area response actions at the IDEQ's Big Creek Repository, provided that those soils and materials are within the repository's acceptance criteria. If the soils and other materials do not meet the Repository's acceptance criteria, then the IDEQ shall dispose of them at a properly permitted disposal facility in accordance with all applicable laws and regulations.

(b) Tomsche Road Area Drainage. The Parties agree to work together to develop a mutually acceptable approach to address potential storm drainage issues associated with the former rail bed in the Tomsche Road Area, between MM 0.50 and 0.75 of the former WIRR right-of-way in Canyon Creek.

(c) Unpaved Private Road Providing Access to ROW Residential Use Area. The Parties identified an unpaved access road leading to a Residential Use Area within the Functional Right-of-Way Width in the segment from MM 3.25 to MM 3.57 of the former WIRR right-of-way in Canyon Creek. The Parties further determined, and the EPA has recommended, that the appropriate response action for the Functional Right-Of-Way Width in this area is placement of a 12-inch gravel, or equivalent asphalt, barrier. No soils will be removed.

(d) Non-Residential Areas of FROWW Along Canyon Creek and Ninemile Creek. The Parties may determine that UPRR and BNSF will fund IDEQ implementation of the response actions specified in the Ninemile and Canyon Creek Elements of Work (sections 2.4 and 2.5) in the Statement of Work (Exhibit ___) to the Consent Decree. In that event, the provisions of Sections 3, 4, and 5(b)-(e), below, will govern the funding and performance of this work.

3. **No Operation and Maintenance**. There will be no ongoing or future operation and maintenance associated with any response actions to be performed under this Agreement.

4. **Access to the Former WIRR and NP Rights-of-Way**. The Parties acknowledge that the former WIRR and NP rights-of-way are not owned by UPRR and/or BNSF. Accordingly, any response action under this Agreement within the areas located on the Functional Right-of-Way Width is contingent upon the cooperation and consent of the current landowner. The IDEQ assumes sole responsibility for securing legal access from such landowners for the purpose of conducting the response actions described in Section 2, above.

5. **Reimbursement of the IDEQ by UPRR and BNSF**. UPRR and BNSF agree to reimburse the IDEQ for the reasonable costs of response actions described in Section 2 above in accordance with the procedures of this Section. The agreed-upon response action costs shall include all project/program management, indirect, and oversight response costs, and UPRR and BNSF shall not be liable for any further cost recovery claims by either the IDEQ or the EPA for the work covered by this Agreement.

DRAFT

CONFIDENTIAL SETTLEMENT COMMUNICATION

SUBMITTED UNDER FRE 408 AND ANY STATE LAW EQUIVALENT

(a) Residential Use Areas. UPRR and BNSF agree to reimburse the IDEQ for the reasonable costs of response actions described in Section 2(a), above, that are performed on ROW Residential Use Areas and that are included in budgets approved in accordance with subsection (c) below. Reimbursable response actions may include, without limitation, testing of soil, excavation of contaminated soil, removal and proper disposal of contaminated soil, placement of visual marker fabric, placement of clean soil, replacement of grass, gravel or other surface covering that was disturbed by the excavation, placement of gravel or other barriers, and minor grading needed to prevent damage to the response action or to protect remediated areas from recontamination. For ROW Residential Use Areas where contaminated soil is removed and replaced with clean soil, the total amount of reimbursement shall be based upon the IDEQ's average cost per square foot of excavated area during the year in which the work is performed. For example, \$4.54 was the IDEQ's 2006 average cost per square foot of excavated area. The Parties anticipate that the average cost per square foot of excavated area will be similar for work in 2009 and 2010. The maximum average cost per square foot of excavated area allowed under this Agreement shall be **[insert number based on experience in 2007 and 2008]**. For ROW Residential Use Areas where no soils are excavated and sampling alone occurs, the amount of reimbursement shall be based upon the IDEQ's actual cost of sampling that yard.

(b) Other Response Action Areas. UPRR and BNSF agree to reimburse the IDEQ for the reasonable costs of response actions described in Sections 2(b), (c), and (d) above, that are performed within the Functional Right-Of-Way Width and that are included in budgets approved in accordance with subsection (c) below. Reimbursable response actions may include, without limitation, placement of clean soil, gravel or asphalt pavement, seeding of soil cover areas, and minor grading needed to prevent damage to the response action or to protect remediated areas from recontamination. Because the scope of activities for response actions in these areas is different than for residential yards, it is anticipated that costs of the response action work identified in Sections 2(b), (c), and (d) above, will be different than costs for residential yards. Accordingly, the IDEQ shall separately track its costs in these areas and propose a separate average unit price for the reimbursement of these costs.

(c) Budget Procedure. The IDEQ shall submit to UPRR and BNSF annual budgets. The proposed budgets shall be submitted sixty (60) days in advance of the first month of the year in which the work is to be performed. At a minimum, the proposed budget will identify the response actions to be performed, identify the locations at which the work will be performed using maps or whatever other method accurately shows the locations, state the anticipated square footage of the area(s) in which contaminated soils are proposed to be excavated, removed and replaced, state the anticipated square footage of the area(s) in which clean soil, gravel or asphalt barriers are proposed to be placed, and state the estimated costs of the proposed response actions. Upon receipt of a proposed budget, UPRR and BNSF will review it and advise the IDEQ twenty (20) days before the first month of the year in which the work is to be performed whether they object to the budget and the grounds for the objection. Grounds for objection may include but are not limited to: the location of the proposed response actions is outside of the Functional Right-of-Way Width; the proposed response actions are inconsistent with the National Contingency Plan; the proposed response actions not included in the EE/CA, the Action Memo, the Statement of Work (for response actions under Section 2(d)), the Consent Decree, or this

DRAFT

CONFIDENTIAL SETTLEMENT COMMUNICATION

SUBMITTED UNDER FRE 408 AND ANY STATE LAW EQUIVALENT

Agreement; and/or the proposed cost per square foot exceeds the amount allowed under this Agreement.

(d) **Invoice Procedure.** The IDEQ shall submit to UPRR and BNSF annual invoices. The invoices shall be submitted within sixty (60) after the end of the year in which the work was performed. At a minimum, the invoice shall identify the response actions performed, identify the locations at which they were performed using maps or whatever other method accurately shows the locations, specify the square footage of the area(s) in which contaminated soils were excavated, removed and replaced, specify the square footage of the area(s) in which clean soil, gravel or asphalt barriers were placed, and state the costs incurred for each response action. The IDEQ should also submit any supporting documentation such as lab results on which response actions were based, completion reports for each property or segment remediated, subcontractor or supplier invoices, and similar documentation of the extent of the work performed. Upon receipt of an invoice, UPRR and BNSF will review it and advise the IDEQ within thirty (30) days after receipt whether they object to the invoice and the grounds for objection. Grounds for objections may include but are not limited to: the location of the response actions is outside of the Functional Right-of-Way; the response actions are inconsistent with the National Contingency Plan; the response actions are not included in the EE/CA, the Action Memo, the Statement of Work (for response actions under Section 2(d)), the Consent Decree, or this Agreement; and/or the cost exceeds the amount allowed under this Agreement or the approved budget.

(e) **Payment.** UPRR and BNSF shall pay undisputed costs that do not exceed approved budget amounts within forty-five (45) days of receipt of the invoice. Payment shall be made by a check or checks made payable to the Idaho Department of Environmental Quality. Checks shall be sent to: IDEQ Fiscal Office, 1410 N. Hilton, Coeur d'Alene, ID 83706-1253. Should the amount invoiced exceed the approved budget amount, then UPRR and BNSF reserve the right to defer payment of undisputed costs in excess of the approved budget amount for a period of up to one year.

6. **UPRR and BNSF Option To Perform Work.** UPRR and BNSF reserve the right to elect to perform all or any portion of the work described in an IDEQ annual budget. UPRR and BNSF will advise the IDEQ of their intent to exercise this option and identify the work they will perform within twenty (20) days before the first day of the month in which the work is to be performed.

7. **Satisfaction of UPRR and BNSF Obligations.** Together, the IDEQ's actions and UPRR's and BNSF's payments to the IDEQ under this Agreement, or UPRR's and BNSF's performance of work following their election under Section 5, above, shall be deemed to satisfy any and all obligations UPRR and BNSF may have to perform response actions on the areas identified in Section 2, above, including but not limited to any and all obligations under the Consent Decree.

8. **Dispute Resolution.** The Parties agree to make all reasonable efforts to resolve through good-faith negotiation any disputes concerning response actions, extent of Functional Right-of-Way Width, budgets, invoices, payments, or any other decisions or actions under this Agreement, the terms and conditions of this Agreement, or any alleged breach thereof. In the

DRAFT

CONFIDENTIAL SETTLEMENT COMMUNICATION

SUBMITTED UNDER FRE 408 AND ANY STATE LAW EQUIVALENT

event that such a dispute cannot be resolved by good-faith negotiation, the Consent Decree dispute resolution provisions shall apply.

9. **Successors and Assigns.** This Agreement shall be binding upon the successors and assigns of the Parties.
10. **Counterparts.** This Agreement may be executed in one or more counterparts, each of which shall be deemed an original, but all of which shall constitute one and the same instrument.
11. **Entire Agreement.** This Agreement, together with the Consent Decree and the Statement of Work (for response actions under Section 2(d)), constitute the entire understanding of the Parties with respect to its subject matter.
12. **Modification of Agreement.** This Agreement may only be modified in a writing signed by all Parties.
13. **No Third Party Beneficiaries.** This Agreement is for the sole and exclusive use of the Parties hereto, and none of the provisions of this Agreement shall be deemed to be for the benefit of any other person or entity.
14. **Negation of Agency Relationship.** This Agreement shall not be construed to create, either expressly or by implication, the relationship of agency or partnership between the Parties. No Party, including such Party's agents, employees, contractors or attorneys, is authorized to act on behalf of the other Party in any manner relating to the subject of this Agreement except as expressly provided in this Agreement. No Party shall be liable for any acts performed or errors or omissions committed by the other Party's officers, agents, employees or contractors with respect to or in the performance of this Agreement.
15. **No Admission of Liability.** This Agreement, its recitals and terms, and any activities performed under it shall not be construed in any way as an admission of liability by either Party in any administrative or judicial proceeding. This Agreement shall not be admissible for any purpose other than enforcement of its terms between the Parties.
16. **Effective Date.** The "Effective Date" of this Agreement shall be the later of the date it has been signed by each of the Parties, as indicated below, and the date that the Consent Decree is entered by the Court as a final judgment.

[Darrell – we need to discuss covenants not to sue, releases, contribution protection, etc.]

IN WITNESS WHEREOF, the Parties enter into this Agreement. Each person signing this Agreement represents and warrants that he or she has been duly authorized to enter into this Agreement by the company or entity on whose behalf it is indicated that the person is signing.

UNION PACIFIC RAILROAD COMPANY

By:_____

DRAFT
CONFIDENTIAL SETTLEMENT COMMUNICATION
SUBMITTED UNDER FRE 408 AND ANY STATE LAW EQUIVALENT
Its: _____

Date: _____

Notice Address:

Union Pacific Railroad Company
Attn: Mr. Gary Honeyman
221 Hodgeman
Laramie, WY 82072
Fax: (307) 745-3042
Phone: (307) 745-6532
Email: GLHoneym@up.com

Robert C. Bylsma
Union Pacific Railroad Company
10031 Foothills Blvd., Suite 200
Roseville, CA 95747-7101
Phone: (916) 789-6229
Fax: (916) 789-6227
Email: rcbylsma@up.com

Robert W. Lawrence
Gail L. Wurtzler
Davis Graham & Stubbs LLP
1550 Seventeenth Street, Suite 500
Denver, CO 80202
Fax: (303) 893-1379
Phone: (303) 892-7409
Email: Robert.Lawrence@dgsllaw.com

BNSF RAILWAY COMPANY

By: _____

Its: _____

Date: _____

Notice Addresses:

Bruce Sheppard
BNSF Railway Company
2454 Occidental Ave., #1A

DRAFT
CONFIDENTIAL SETTLEMENT COMMUNICATION
SUBMITTED UNDER FRE 408 AND ANY STATE LAW EQUIVALENT
Seattle, WA 98134-1451
Phone: (206) 625-6035
Fax: (206) 625-6007
Email: bruce.sheppard@bnsf.com

Pamela Nehring
BNSF Railway Company
2500 Lou Menke Drive
Fort Worth, TX 76131-2828
Phone: (817) 352-3469
Fax: (817) 352-3468
Email: pamela.nehring@bnsf.com

Craig Trueblood
K&L Gates
925 Fourth Avenue, Suite 2900
Seattle, WA 98104-1158
Phone: (206) 370-8368
Fax: (206) 623-7022
Email: craig.trueblood@klgates.com

IDAHO DEPARTMENT OF ENVIRONMENTAL QUALITY

By:_____

Its:_____

Date:_____

Notice Addresses:

State Project Coordinator
Idaho Division of Environmental Quality
1005 McKinley Avenue
Coeur d'Alene, ID 87837
Fax:
Phone:
Email:

Darrell Early
Office of the Attorney General
1410 N. Hilton
Boise, ID 83706
Fax:
Phone: (208) 373-0494
Email: Darrell.Early@deq.idaho.gov

DRAFT
CONFIDENTIAL SETTLEMENT COMMUNICATION
SUBMITTED UNDER FRE 408 AND ANY STATE LAW EQUIVALENT